OCT 25 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 433.

THE STATE OF KANSAS, EX REL. LELUS B. BROWN, COUNTY ATTORNEY OF HARVEY COUNTY, KANSAS, THE BOARD OF COUNTY COMMISSIONERS OF HARVEY COUNTY, KANSAS; HALSTEAD TOWNSHIP OF HARVEY COUNTY, KANSAS; LAKIN TOWNSHIP OF HARVEY COUNTY, KANSAS; HALSTEAD COMMON SCHOOL DISTRICT NO. 52 OF HALSTEAD, KANSAS; RURAL HIGH SCHOOL DISTRICT NO. 1 OF HALSTEAD, KANSAS; BENTLEY PUBLIC SCHOOL DISTRICT NO. 185, JOINT, OF BENTLEY, KANSAS; and VALLEY CENTER TOWNSHIP OF SEDGWICK COUNTY, KANSAS, *Appellants*,

vs.

CLAY HEDRICK, AS COUNTY CLERK OF HARVEY COUNTY, KANSAS; THE STATE COMMISSION OF REVENUE AND TAXATION OF THE STATE OF KANSAS; AND THE CITY OF WICHITA, KANSAS, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

MOTION TO DISMISS.

ROBT. B. MORTON,
303 South Main,
Wichita, Kansas,

PAUL J. DONALDSON,
344 South Broadway,
Wichita, Kansas,

DOUGLAS E. SHAY,
728 Beacon Building,
Wichita, Kansas,

Counsel for Appellee, City of Wichita, Kansas.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

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THE STATE OF KANSAS, EX REL. LELUS B. BROWN, COUNTY ATTORNEY OF HARVEY COUNTY, KANSAS, THE BOARD OF COUNTY COMMISSIONERS OF HARVEY COUNTY, KANSAS; HALSTEAD TOWNSHIP OF HARVEY COUNTY, KANSAS; LAKIN TOWNSHIP OF HARVEY COUNTY, KANSAS; HALSTEAD COMMON SCHOOL DISTRICT NO. 52 OF HALSTEAD, KANSAS; RURAL HIGH SCHOOL DISTRICT NO. 1 OF HALSTEAD, KANSAS; BENTLEY PUBLIC SCHOOL DISTRICT NO. 185, JOINT, OF BENTLEY, KANSAS; and VALLEY CENTER TOWNSHIP OF SEDGWICK COUNTY, KANSAS, *Appellants,*

VS.

CLAY HEDRICK, AS COUNTY CLERK OF HARVEY COUNTY, KANSAS; THE STATE COMMISSION OF REVENUE AND TAXATION OF THE STATE OF KANSAS; AND THE CITY OF WICHITA, KANSAS, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

MOTION TO DISMISS.

Appellee, the City of Wichita, Kansas, moves to dismiss this appeal on the grounds that it does not present

any Federal question and that the judgment of the Supreme Court of the State of Kansas, sought to be reviewed, is based exclusively on an adequate non-federal ground.

STATUTES AND ORDINANCES INVOLVED.

28 U. S. C. 1257 (2) and (3) reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Sections 79-201 *Sixth* and *Seventh* and Section 13-1406 of the General Statutes of Kansas, 1949, read as follows:

> "79-201. *Property Exempt.* That the property described in this section, to the extent herein limited, shall be exempt from taxation:
>
> * * * * * * *
>
> "*Sixth.* All property belonging exclusively to any county, city, town or school district, except lands bid off for counties or cities at tax sales.

"*Seventh.* All works, machinery and fixtures belonging and owned by any town, city or village, and used exclusively for conveying water to such town, city or village."

"13-406. *Exemptions of Property.* Lands, buildings, money, debts due the city and all other property and assets belonging to the city shall be exempt from taxation, execution, and sale."

Ordinance No. 13-520 finally passed and adopted by the City of Wichita, Kansas, on November 2, 1942, entitled

"An Ordinance Granting to the Wichita Water Company, Its Successors and Assigns, the Right and a Franchise to Operate and Maintain a System of Waterworks in the City of Wichita, Kansas, for the Purpose of Supplying and Distributing Water to Said City and Vicinity and Environs and the Inhabitants Thereof, Prescribing the Terms of Said Grant and Relating Thereto."[1]

STATEMENT.

Appellee, the City of Wichita, Kansas, is located in Sedgwick County and since 1940 has owned and been in possession of certain water lines, pumping equipment and appurtenances located in the adjoining county of Harvey, fifteen to twenty miles north of the limits of the City of Wichita. Said water lines, pumping equipment and other appurtenances are exclusively used by the City of Wichita in conveying water to the City for use by its inhabitants. The water so conveyed to the City is distributed to the inhabitants by The Wichita Water Company, a privately owned public utility, under a franchise from the

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[1]The material portions of this Ordinance are set forth verbatim in Appendix B, *infra*, Page A3.

city, being Ordinance No. 13-520, a copy of which is set out in Appendix B, *infra*, Page A3.

On April 19, 1954, appellant Lelus B. Brown, County Attorney of Harvey County, Kansas, filed in the District Court of that county a motion for writ of mandamus to compel the County Clerk of Harvey County to assess and levy taxes on the water lines, pumping equipment and appurtenances owned by the City of Wichita and located in that county. The motion for writ of mandamus, a copy of which is printed in Appendix A, *infra*, Page A1, alleged that by virtue of the franchise ordinance No. 13-520 between the City of Wichita and The Wichita Water Company, the beneficial use of said water lines and supply equipment was vested in The Wichita Water Company and therefore not exempt from taxation by Harvey County. This allegation was the only ground asserted in support of the relief sought. The same ground was likewise set out in the answers of other appellants.

On August 23, 1954, the District Court of Harvey County, Kansas, sustained the motion of appellee, the City of Wichita, Kansas, to quash the alternative writ of mandamus that had issued. Appellants appealed such order of the District Court of Harvey County to the Supreme Court of the State of Kansas. The latter court on May 7, 1955, affirmed the ruling of the trial court in quashing the alternative writ of mandamus and found that the Wichita Water Company had no beneficial interest in said water lines and supply equipment and that such water lines and equipment were used exclusively by the City of Wichita, Kansas, for the conveyance of water to the City for use by its inhabitants. On September 26, 1955, appellants filed their notice of appeal from said decision in this Court along with their jurisdictional statement under Section 28, U. S. C. 1257 (2) (3).

ARGUMENT.

No Federal Question Involved.

This court has no jurisdiction to review, by way of appeal or certiorari, the judgment of the Supreme Court of Kansas entered in this case unless the validity of a Kansas statute has been "drawn in question" on the ground of its being repugnant to the Constitution of the United States.[2] There is no allegation contained in the motion for writ of mandamus or in the answers of appellants that any Kansas statute is invalid on the ground that it is repugnant to the Constitution of the United States. Although the motions and answers of appellants have been designated as a part of the record, those pleadings are set forth for the court's convenience in Appendix C, *infra*, Page A9.

When the case reached the Supreme Court of the State of Kansas, appellants departed from the allegations of their pleadings and asserted for the first time the unconstitutionality of two Kansas statutes, namely, G. S. 1949, Section 79-201, *Sixth*, and Section 13-1406. The texts of those statutes are set forth *supra*. The Kansas Supreme Court, however, expressly refrained from considering or passing upon the constitutionality of either of these statutes. Its decision was based solely upon the following factual determination:

> "By way of summary we conclude that the motion for the writ and the ordinance attached as a part thereof disclose that The Wichita Water Company had no beneficial interest in the property of the city of

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[2]28 U. S. C. 1257 (2) (3).

> Wichita located in Harvey county; that the property, works, machinery and fixtures belonging to the city for conveying water to such city, were used exclusively for that purpose; that under G. S. 1949, 79-201, Seventh, such property was exempt from taxation and that the trial court did not err in rendering judgment quashing the motion for the alternative writ of mandamus to compel the county clerk of Harvey county to assess the property for taxation and the alternative writ issued."[3]

The validity and constitutionality of G. S. 1949, 79-201, *Seventh*, was never challenged by appellants at any stage of the proceedings. The state court's decision was factual in nature, consisting of an interpretation and construction of the franchise ordinance. Once having determined that *in fact* the water supply equipment was *used* for a public purpose such property was clearly exempt from taxation under the wording of G. S. 1949, 79-201, *Seventh*, and there was no occasion to consider the validity of any other Kansas statute on the ground that it was repugnant to the Constitution of the United States.

The jurisdictional statement filed by appellants clearly discloses that the validity of G. S. 1949, 79-201, *Seventh*, is not questioned on the ground that it is repugnant to the 14th Amendment of the Constitution of the United States. The very wording by appellants in their jurisdictional statement of their "Questions Presented" makes it clear that their complaint lies in the fact that such statute has been incorrectly *construed*. In other words, they contend that the decision and judgment of the Kansas Supreme Court is subject to appeal to this Court, not because the

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[3]See decision of Supreme Court of the State of Kansas in *State ex rel.* v. *Hedrick* printed at Appendix A of appellants' jurisdictional statement, Page 23.

Kansas tax exemption statute is repugnant to the Federal Constitution, but because the Kansas Supreme Court incorrectly found as a matter of fact that the city of Wichita's property in question fell within the wording of the statutory exemption.

This Court has long held that with respect to the construction of state statutes that the state court's views are completely non-reviewable.[4] Jurisdiction should not be here asserted merely to review the decision by the Kansas Supreme Court upon a question of fact, namely, that the property, works, machinery and fixtures belonging to the city and conveying water to such city, were used exclusively for that purpose (see language *supra*). It is not the function of this court merely to give the defeated party of the state court another hearing and in such hearing to re-examine the state court's findings and conclusions of fact. The function of this court is to secure federal rights.

Non-Federal Ground Adequate to Support State Court Judgment.

This court has consistently adhered to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a Federal question be involved and perhaps wrongly decided.[5] As stated in *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6:

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[4]*Portland R. Co.* v. *Railroad Commission*, 229 U. S. 397, 412; *Grayson* v. *Harris*, 267 U. S. 352, 358; *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160.

[5]*Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U. S. 207; Supreme Court Practice, 2nd Edition, 1954, by Robert L. Stern and Eugene Gressman.

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the relations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

In its decision the Kansas Supreme Court merely found that the property, works, machinery and fixtures belonging to the city and conveying water to such city, were *used exclusively* for that purpose. The court based its conclusion upon the allegations contained in appellants' motion for writ of mandamus and the franchise ordinance attached as a part thereof. Sections G. S. 1949, 79-201, Seventh, exempts

> "all works, machinery and fixtures belonging to and owned by any town, city or village, and *used exclusively* for conveying water to such town, city or village" (Emphasis supplied).

Therefore, the City's property used for that purpose is exempt from taxation. There is no important question of Federal law to decide. There is no Kansas statute repugnant to the 14th Amendment of the Constitution of the United States. The decision of the Kansas court is clear, simple and concise. It is solely based on a non-federal ground that is entirely adequate to support the judgment. In fact it is difficult to imagine how any Federal question could be involved or even relevant to the decision.

This court's decisions cited by appellants on pages 3 and 4 of their Jurisdictional Statement cannot support the jurisdiction of the court in this case where the validity of a Kansas statute has not been drawn in question. In fact *Jet Bros. Distilling Co.* v. *Carrollton*, 262 U. S. 1, cited by appellants, clearly holds that a mere objection to an exercise of authority under a state statute whose validity is not attacked cannot be made the basis of a writ of error to this court. Appellee does not take exception to the general principles of law quoted by appellants from other decisions of this court in the Jurisdictional Statement, pages 13 through 21. Such principles of law, however, cannot be applied to the facts of the instant case.

CONCLUSION.

We respectfully submit, therefore, that the appellants present no Federal question for the decision of this court and that their appeal should be dismissed.

ROBT. B. MORTON,
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Wichita, Kansas,

PAUL J. DONALDSON,
344 South Broadway,
Wichita, Kansas,

DOUGLAS E. SHAY,
728 Beacon Building,
Wichita, Kansas,

Counsel for Appellee, The City of Wichita, Kansas.

October ____, 1955.

APPENDIX A.

Motion for Writ of Mandamus.

Comes now the State of Kansas on the relation of Lelus B. Brown, the duly elected, qualified, and acting County Attorney of Harvey County, Kansas, and respectfully shows to the Court:

(1) That Clay Hedrick is the duly appointed, qualified, and acting County Clerk of Harvey County, Kansas.

(2) That the City of Wichita, Kansas, has the legal title to certain water pipe lines, pumping equipment, and other appurtenances located in Harvey County, Kansas, but that the beneficial use thereof is in the Wichita Water Company, a private corporation organized for profit.

That the City of Wichita, Kansas, purchased and installed said pipe line and other appurtenances located in Harvey County, Kansas, pursuant to a certain agreement with said Wichita Water Company in connection with a certain franchise, that hereunto attached, marked "Exhibit A," is a true and correct copy of Ordinance No. 13-520, which sets forth the agreement or arrangement between said city and said water company.

(3) That under the Constitution of the State of Kansas, said pipe line and other appurtenances are not exempt from taxation; however, the defendant and his predecessors in office have failed and neglected to assess said pipe line and appurtenances for taxation.

(4) That plaintiff has no adequate remedy at law and is therefore entitled to a Writ of Mandamus from this Court directed to Clay Hedrick, as County Clerk of Harvey

County, Kansas, requiring him to assess said pipe line and other appurtenances in Harvey County, Kansas, the legal title to which is in the City of Wichita, Kansas, and further requiring him to assess and tax said properties for prior years.

WHEREFORE, premises considered, plaintiff respectfully moves and prays this Court to issue a Writ of Mandamus directed to Clay Hedrick, as County Clerk of Harvey County, Kansas, commanding him to assess said property for taxation for the current and prior years according to law.

LELUS B. BROWN,
County Attorney of Harvey County, Kansas.

KENNETH G. SPEIR,
Special Assistant to Said County Attorney.

STATE OF KANSAS, COUNTY OF HARVEY, SS.

Lelus B. Brown, of lawful age and being first duly sworn upon oath, states:

That he is the duly elected, qualified, and acting County Attorney of Harvey County, Kansas; that he has read and understands the above and foregoing Motion for Writ of Mandamus; and that the facts and statements therein contained are true and correct as he is informed and verily believes.

LELUS B. BROWN

Subscribed and sworn to before me this 14th day of April, 1954.

Mildred Thudin,
Notary Public.

(SEAL)

Comm. exp. Feb. 11, 1957.

APPENDIX B.

Exhibit "A."

Published in Wichita Eagle on November 5, November 12th and November 19, 1942.

ORDINANCE NO. 13-520

AN ORDINANCE GRANTING TO THE WICHITA WATER COMPANY, ITS SUCCESSORS AND ASSIGNS, THE RIGHT AND A FRANCHISE TO OPERATE AND MAINTAIN A SYSTEM OF WATERWORKS IN THE CITY OF WICHITA, KANSAS, FOR THE PURPOSE OF SUPPLYING AND DISTRIBUTING WATER TO SAID CITY AND VICINITY AND ENVIRONS AND THE INHABITANTS THEREOF, PRESCRIBING THE TERMS OF SAID GRANT AND RELATING THERETO.

(Only the material portions of the following Ordinance are abstracted herein.)

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA, KANSAS:

SECTION 1. That The Wichita Water Company, a corporation, its successors and assigns, be and it is hereby granted the right and a franchise for the purpose of constructing, operating, extending and maintaining and continuing to operate and maintain a system of waterworks in the City of Wichita, Kansas, for the purpose of supplying and distributing water to said City and vicinity and environs and the inhabitants thereof for domestic, commercial, industrial and other uses, as well as for the extinguishing of fires, and subject to the limitations herein stated, said The Wichita Water Company, (hereinafter

designated as the "Grantee") is granted permission to use such portions of the streets, alleys, avenues, parkways, boulevards and other public grounds of the City of Wichita, as are now used and as may be necessary for the purpose of constructing, operating, extending and maintaining a system of waterworks for the purpose aforesaid.

PROVIDED, that the use of the said streets, alleys, avenues, parkways, boulevards and other public grounds shall at all times be subject to the right of the City of Wichita under the law to make reasonable rules and regulations relating to the manner of such use and said "Grantee" shall never unreasonably interfere with the other proper uses of said streets, alleys, avenues, parkways, boulevards and other public grounds.

SECTION 2. . . . .

SECTION 3. . . . .

SECTION 4. The City, shall during the life of this franchise, deliver to the Grantee, for distribution by it hereunder, an adequate supply of water at all times except when prohibited by unforeseen breaks or other emergencies beyond the City's control, delivering said water into reservoirs or pumping station of the grantee on Waterworks Island. Provided, however, that in case of temporary discontinuance or inadequacy of the City's said supply of water from any cause, the Grantee shall operate any or all of its then existing wells as may be required to maintain the service. Said water thus to be supplied by the City as well as water supplied by the Grantee from its own sources of supply shall at all times conform in quality with such requirements as may be from time to time established for interstate carriers by the United States Public Health Service. Grantee shall at all times maintain its present well system for emer-

gency use and to augment the supply of water delivered by the City to the Grantee in case of inadequacy.

Commencing with the delivery of said water by the City to the Grantee under this franchise, the Grantee will pay to the City $10.00 per million gallons of water for all water so delivered by the City into the reservoir of the Grantee or to its pumping station located on what is known as Waterworks Island. . . . . .

In addition the Grantee shall pay to the City at the rate of Six Hundred Fifteen Dollars ($615.00) per month commencing with the effective date of this Franchise, said payment to be made on the fifteenth secular day of every calendar month for the preceding month. Said monthly sum of Six Hundred Fifteen Dollars ($615.00) represents the estimated net savings in operating expenses through the distribution of water so supplied by the City as compared with the distribution of water from the Grantee's own facilities. Said sums so paid shall be considered as sums paid for water produced and furnished by the City.

In the event of failure or failures of the City's water supply facilities so as to require Grantee to operate its own wells for an aggregate of more than fifteen days per annum, then the monthly payments of Six Hundred Fifteen Dollars ($615.00) as aforesaid shall be abated proportionately for the number of days in excess of fifteen that the Grantee is required to operate its wells. Each of the parties hereto pledges its cooperation with the other in carrying forward the operations provided for in this Franchise in such manner as to best promote the public interest.

SECTION 5. All water service shall be by meter measurement except for extinguishment of fires, and except as herein otherwise provided, which shall be governed by contract between "Grantee" and the consumer, subject to

the regulatory jurisdiction of the City, or such other body as may hereafter have jurisdiction over the rules, practices and standard of service of the "Grantee" as may from time to time exist.

SECTION 6. Until such time as they are changed by the Board of Commissioners of the City of Wichita, or such body or tribunal as shall have jurisdiction thereover, the present regular schedule of meter rates now in effect shall apply and is as follows: * * *.

SECTION 7. . . . .

SECTION 8. The Grantee agrees to add to its own rates and all bills rendered to its consumers, except the City of Wichita and its departments, and to collect for the City (where it may reasonably be done without litigation) upon all amounts collected for itself, until the further ordinances of the City, a surcharge as follows:

(a) To all consumers using water within the City of Wichita and to all industrial consumers as defined by Paragraph (a) on Page 115 of a book on file in the Water Company's office, entitled "Instructions as to the Use of the Uniform System of Account for Water Utilities Adopted by the National Association of Railroad and Utility Commissioners, including Supplemental Explanation and Additional Sub-accounts," fifteen per cent (15%);

(b) To all other consumers, thirty per cent (30%)—calculated on the basis of the regularly established rates in the City of Wichita.

All the money so collected by the Grantee for the City under the above provisions, during each calendar month, shall be remitted to the City of Wichita on or before the 15th secular day of the following calendar month.

The City shall have the option at any time to change the foregoing surcharges, or any of them, by the enactment of an ordinance, and such surcharge or surcharges as is put into effect by such ordinance shall be collected by the Grantee as is herein provided.

. . . .

SECTION 9. . . . .

SECTION 10. The Grantee will accept a basic amount of Two Hundred Twenty-Five Thousand Dollars ($225,000.00) per year as the gross income available as a return for its property as it existed December 31, 1941. The amount of $225,000.00 available for a return is defined as the gross operating revenue Grantee receives and retains from its water customers less operating expenses, maintenance, taxes, and a basic amount for depreciation of Forty-Five Thousand Dollars ($45,000.00) per annum predicated upon the depreciable property as same existed as of December 31, 1941. The Grantee shall be entitled to receive as a return on its property for each year beginning January 1, 1943, the amount of $225,000.00 plus six (6) per cent return and one (1) per cent for depreciation on the cost of all betterments and replacements less the cost of all property abandoned, from and after December 31, 1941, and less six (6) per cent each year on the amount by which the depreciation reserve exceeds the depreciation reserve as shown by the Balance Sheet of the Grantee as of December 31, 1942, it being understood that for the purpose of calculating the balance upon which said six (6) per cent last mentioned is to be computed, no deductions shall be considered from the depreciation reserve, except the cost of all property abandoned and the cost of abandoning such property less its salvage value. *If during any calendar year beginning with the calendar year 1943 during the effective period of this franchise, the said gross income of the*

Grantee is more than $225,000.00 plus six per cent return and one per cent for depreciation on the net cost of betterments and less six per cent (6%) per annum on the increase in the depreciation reserve, as aforesaid, then the Grantee will pay to the City for water delivered to it, in addition to $10.00 per million gallons, an amount equal to one-half of such difference, such additional payment to the City for water to be paid annually within one hundred twenty (120) days after December thirty-first of each calendar year. (Emphasis supplied.)

The Grantee shall make a report annually to the City on or before April 1st of each year, commencing April 1, 1944, showing for the previous calendar year gross revenues and operating expenses, maintenance, taxes and accruing depreciation in accordance with the classification of accounts used by the Grantee. The Grantee shall also concurrently furnish the City with a statement showing the cost of all betterments and replacements and the cost of all property abandoned from and after December 31, 1941, together with the increase or decrease, as the case may be, in the depreciation reserve from and after December 31, 1942.

The Grantee agrees that the aggregate management charges paid by it under the present or any similar management contract for present or similar services rendered or to be rendered Grantee by any other party or agency and charged as an operating expense of the Grantee, shall not exceed the percentage paid by other water companies in the same affiliated group under similar contracts and shall at no time exceed four per cent (4%) of the gross operating revenues of the Grantee for any calendar year.

SECTION 11 to SECTION 26 inclusive . . . .

This ordinance was duly passed by the Board of Commissioners after a third reading thereof at a third weekly meeting of the Board of Commissioners of the City of Wichita, being finally passed and adopted upon the 22nd day of November, 1942.

/s/ O. F. SULLIVAN,
Mayor

ATTEST: /s/ C. C. Ellis, City Clerk.

APPENDIX C.

Filed April 24, 1954.

Answer.

Comes now the defendant Clay E. Hedrick as County Clerk of Harvey County, Kansas and for his answer to the plaintiff's Alternative Writ of Mandamus and the motion therefore, filed herein in the above entitled matter alleges and states:

THAT said writ and a copy of said motion was served upon him by one of the plaintiff's attorneys, Kenneth G. Speir on the 20th day of April, 1954, and said writ is returned herewith.

THAT said defendant was regularly appointed to serve the unexpired term of the duly elected County Clerk of Harvey County, Kansas and on January 1, 1954 said defendant was duly qualified for said office and assumed the duties thereof and is now the acting County Clerk of said county.

THAT, the records of the defendant's office disclose that in the year 1941, the following described real estate situated in Harvey County, Kansas, to wit:

> Five (5) acres in square form in the Northwest corner of the Northwest Quarter (NW¼) of Section Sixteen (16), Township Twenty-four (24) South, Range Two (2) West of the 6th P. M.

was entered upon the tax rolls as the property of the City of Wichita, Kansas; that said real estate was assessed for taxes in the years 1941, 1942, 1943, 1945; that on the 6th day of July, 1946, an order was issued by the Commission

of Revenue and Taxation of the State of Kansas, order No. 355, abating the tax so assessed for the reason that said real estate was exempt property under the constitution and laws of the State of Kansas; that subsequent to said order, the defendant's predecessors in office did not again assess the real estate, personal property, or leasehold interests, belonging to said City and situated in Harvey County, Kansas.

THAT said defendant has not placed any of said property upon the assessment rolls of Harvey County, Kansas, for the current year because of said order, and further for the reason that the legal title to said property is in the City of Wichita a municipality of the State of Kansas and a city of the first class, and therefore under the provisions of Article Eleven (11), Section One (1) of the Constitution of Kansas and Sections 13-1406 and 79-201 of the General Statutes of Kansas of 1949 said property is exempt from taxation.

THAT Section 79-201, above said, provides, in part, as follows:

> "79-201. Property Exempt. That the property described in this section, to the extent herein limited, shall be exempt from taxation . . . *Sixth.* All property belonging exclusively to any . . . city, town . . . *Seventh,* All works, machinery and fixtures belonging to and owned by any town, city or village, and used exclusively for conveying water to such town, city or village . . . "

THAT said defendant does not admit or deny the allegations, averments and statements of fact contained in the plaintiff's motion for said writ except as may be herein specifically admitted or denied, but does allege that plaintiff should be required to make strict proof of such allegations, averments and statements of fact, including a specific

description of the property of the City of Wichita, Kansas which plaintiff alleges is subject to taxation and further that said defendant shall abide by the judicial determination of the court.

WHEREFORE, the defendant prays that the Alternative Writ of Mandamus filed herein be dismissed and the defendant have his costs herein.

Alternative Writ of Mandamus.

WHEREAS, it is made to appear to the Court by the application of plaintiff on file in the office of the Clerk of this Court that Clay Hedrick, as County Clerk of Harvey County, Kansas, and his predecessors in office have not assessed certain pipe lines and other appurtenances in Harvey County, Kansas, the legal title to which is in the City of Wichita, Kansas; and,

WHEREAS, it further appears from said petition that said property is not exempt from taxation.

NOW, THEREFORE, in order that full and speedy justice may and shall be done in the premises, you, Clay Hedrick, as County Clerk of Harvey County, Kansas, are hereby commanded and enjoined within the next ten days from receipt of this Writ to assess said pipe lines and other appurtenances thereto in Harvey County, Kansas, the legal title to which is in the City of Wichita, Kansas, or show cause why you have not done so.

WITNESS MY HAND and the seal of said Court at Newton, Kansas, this 19th day of April, 1954.

MABEL A. McMULLEN,

(SEAL)

Clerk of the District Court
of Harvey County, Kansas.

The foregoing Writ allowed this 19th day of April, 1954.

ALFRED G. SCHROEDER,
Judge of the District Court
of Harvey County, Kansas.

Filed April 29, 1954.

Answer of Defendant, the State Commission of Revenue and Taxation of the State of Kansas.

Comes now the State Commission of Revenue and Taxation of the State of Kansas, having been made a party defendant herein, and having been ordered by the Court to appear and properly plead, and for its answer to the alternative writ of mandamus and the motion therefor, filed in the above matter, alleges and states:

That, on the 2nd day of July, 1946, after proper hearing and after recommendation by the County Clerk of Harvey County, this Commission entered its order finding that the following described property situated in Harvey County, Kansas:

> Five (5) acres in square form in the Northwest corner of the Northwest Quarter (NW¼) of Section Sixteen (16) Township Twenty-four (24) South,
>
> Range Two (2) West of the Sixth (6th) P. M.,

and owned by the City of Wichita, was exempt from the payment of real estate taxes;

That said order was based upon the evidence presented to this Commission at that time, and there has been no showing that said property is not now owned by the City of Wichita.

Wherefore the defendant, the State Commission of Revenue and Taxation of the State of Kansas, prays that the plaintiff be required to offer strict proof and show to the Court conclusively that said property is not exempt under the Laws of the State of Kansas.

And defendant further prays that the alternative writ of mandamus filed herein be dismissed as to this defendant, and that the defendant have and recover its costs herein.

Filed May 20, 1954.

Answer of Defendant Board of County Commissioners of Harvey County, Kansas.

Comes now the Board of County Commissioners of Harvey County, Kansas by Lelus B. Brown, the duly elected and acting County Attorney of Harvey County, Kansas and, as such, the official attorney for said Board, and Kenneth G. Speir, special assistant to said county attorney for the purposes of this case, all of Newton, Kansas, and for answer to the Motion for Writ of Mandamus and the Alternative Writ of Mandamus, specifically admits each and every allegation in said motion contained, and affirmatively alleges:

(1) That the facts and statements set forth in said motion are hereby adopted by this answering defendant as its answer herein.

(2) That this answering defendant specifically alleges that all of the water pipelines, pumping equipment, and other appurtenances located in Harvey County, Kansas, the legal title to which is in the City of Wichita, Kansas, is and has been subject to assessment and taxation at all times; that this answering defendant is especially

interested in the subject matter hereof for the reason that it has taxing jurisdiction over all taxable property lying within Harvey County, Kansas; and the defendant, Clay Hedrick, as County Clerk of Harvey County, Kansas should be ordered, directed, and compelled to assess all of said property, the legal title to which is in the City of Wichita, Kansas, for taxation and to place the same upon the tax rolls, not only for current and future tax years, but also for past years as "escape" property.

WHEREFORE, this answering defendant respectfully moves and prays this Court to issue a peremptory Writ of Mandamus to Clay Hedrick as the County Clerk of Harvey County, Kansas, commanding him to assess said property for taxation for current, future, and prior years according to law.

Filed June 9, 1954.

Reply to Answer of Defendant Board of County Commissioners of Harvey County, Kansas.

Comes now Clay Hedrick as the duly appointed authorized Clerk of Harvey County, Kansas and for his reply to the Answer of the Defendant, the Board of County Commissioners of Harvey County, Kansas, filed herein, alleges and states:

THAT this defendant as County Clerk of Harvey County, Kansas has in the past and shall in the future take all necessary action to expediently place upon the tax rolls of Harvey County, Kansas all property therein located which should properly appear upon the tax rolls of said county.

THAT the property referred to in the Answer of the Defendant, the Board of County Commissioners of Harvey

County, Kansas has not been placed upon the tax rolls of the said county, or assessed for taxation purposes for the reason set out in the Answer of Clay Hedrick, County Clerk of Harvey County, Kansas, as heretofore filed herein to the plaintiff's Alternative Writ of Mandamus and the motion filed in support thereof.

WHEREFORE, the defendant, Clay E. Hedrick, County Clerk of Harvey County, Kansas prays that the defendant, the Board of County Commissioners of Harvey County, Kansas request for a peremptory Writ of Mandamus be dismissed and that said defendant have his costs herein.

Filed June 23, 1954.

Answer.

Comes now Lakin Township and Halstead Township of Harvey County, Kansas, by their attorney, J. Rodney Stone, of Newton, Kansas, and for their answers herein state:

That these defendants are legally constituted and existing Townships of Harvey County, Kansas, and as such are each authorized to make and pass budgets for taxes, and to levy taxes upon property within their respective territorial limits as by the laws of Kansas provided.

That the city of Wichita, a municipal corporation of the state of Kansas, has the legal title to certain water pipeline, pumping equipment, and other appurtenances located in the county of Harvey, in the state of Kansas, and more specifically of certain of such property located within the respective territorial limits of said township of Lakin, and

said township of Halstead, in said county of Harvey, in the state of Kansas.

That the city of Wichita, Kansas, purchased and installed said water pipeline and other appurtenances located in said Lakin Township, and in said Halstead Township of Harvey County, Kansas, pursuant to a certain agreement with The Wichita Water Company in connection with a certain franchise arising under Ordinance No. 13-520 of the said city of Wichita, a true copy of which is attached to the Motion For Writ of Mandamus filed herein by the State of Kansas, which is herein referred to and incorporated as though set out herein at length.

That by reason of said Ordinance and Franchise agreement, the beneficial use of said water pipeline and other appurtenances is vested in The Wichita Water Company, a private corporation organized for profit, and is used by said company in the production of private gain or profit under said existing franchise.

That although the legal title of said property is vested in the city of Wichita, Kansas, under the constitution and laws of the state of Kansas, and of the United States, the said property has been and now is *subject to* taxation, and is not exempt therefrom.

That failure to tax said property in the past, and at this time, has been in violation of Section 1, Article XI of the constitution of the state of Kansas, which requires a uniform and equal rate of taxation, and in violation of the 14th Amendment of the constitution of the United States by reason of denial to these respective defendants, and their respective taxpayers, of equal protection under the law.

WHEREFORE, these answering defendants pray that the County Clerk of Harvey County, Kansas, and the State

Commission of Revenue and Taxation of Kansas, be directed to assess said property for taxation for the current and prior years according to law.

Filed June 23, 1954.

Answer.

Comes now Bentley Public School District No. 185, Joint, of Bentley, Kansas, and Valley Center Township of Sedgwick County, Kansas, and by their attorney, J. Rodney Stone, of Newton, Kansas, and for their respective answer by way of intervention state:

That the intervenor, Bentley Public School District No. 185 Joint is a legally constituted and existing school district of Harvey and Sedgwick County, Kansas, and as such is authorized to make and pass budgets for taxes, and to levy taxes upon property within its territorial limits as by the laws of Kansas provided.

That the intervenor, Valley Center Township, is a legally constituted and existing township of Sedgwick County, Kansas, and as such is authorized to make and pass budgets for taxes, and to levy taxes upon property within its territorial limits as by the laws of Kansas provided.

That the city of Wichita, a municipal corporation of the state of Kansas, has the legal title to certain water pipe lines, pumping equipment, and other appurtenances located in the counties of Harvey and Sedgwick, in the state of Kansas, and more specifically of certain of such property located within the territorial limits of these respective intervening defendants, in said county of Harvey and Sedgwick, and in the county of Sedgwick respectively, within the said state of Kansas.

That the city of Wichita, Kansas, purchased and installed said pipe lines and other appurtenances located within the respective territorial limits of these intervening defendants, pursuant to a certain agreement with The Wichita Water Company in connection with a certain franchise arising under Ordinance No. 13-520 of the said city of Wichita, a true copy of which is attached to the Motion For Writ of Mandamus filed herein by the state of Kansas, which is herein referred to and incorporated as though set out herein at length.

That by reason of said Ordinance and Franchise agreement the beneficial use of said water pipe lines and other appurtenances is vested in The Wichita Water Company, a private corporation organized for profit, and is used by said company in the production of private profit and gain under said existing franchise.

That although the legal title of said property is vested in the city of Wichita, Kansas, under the constitution and laws of the state of Kansas, and of the United States, the said property has been and now is subject to taxation, and is not exempt therefrom.

That failure to tax said property in the past, and at this time, has been and is a violation of Section 1, Article XI of the constitution of the state of Kansas, which requires a uniform and equal rate of taxation, and in violation of the 14th Amendment of the constitution of the United States by reason of denial to these respective defendants, and their taxpayers, of equal protection under the law.

WHEREFORE, these intervening defendants pray that the County Clerk of Harvey County, Kansas, and the Commission of Revenue and Taxation of Kansas, be directed to assess said property for taxation for the current and prior years according to law, and that the Commission of

Revenue and Taxation of Kansas, be directed to cause said property within the county of Sedgwick, in the state of Kansas to be assessed for taxation for the current and prior years according to law.

Filed June 23, 1954.

Answer.

Comes now Halstead Common School District No. 52 of Halstead, Kansas, and Rural High School District No. 1 of Halstead, Kansas, by their attorney, J. Rodney Stone, of Newton, Kansas, and for their answer by way of intervention states:

That these defendants are legally constituted and existing school districts of Harvey County, Kansas, and as such are each authorized to make and pass budgets for taxes, and to levy taxes upon property within their respective territorial limits as by the laws of Kansas provided.

That the city of Wichita, a municipal corporation of the state of Kansas, has the legal title to certain water pipelines, pumping equipment, and other appurtenances located in the county of Harvey, in the state of Kansas, and more specifically of certain of such property located within the respective territorial limits of said Halstead Common School District No. 52 of Halstead, Kansas, and said Rural High School District No. 1 of Halstead, Kansas, in said county of Harvey, in the state of Kansas.

That the city of Wichita, Kansas, purchased and installed said water pipelines and other appurtenances located in said Halstead Common School District No. 52 of Halstead, Kansas, and in Rural High School District No. 1 of Halstead, Kansas, pursuant to a certain agreement with The Wichita Water Company in connection with a certain

franchise arising under Ordinance No. 13-520 of said city of Wichita, a true copy of which is attached to the Motion For Writ of Mandamus filed herein by the State of Kansas, which is herein referred to and incorporated as though set out herein at length.

That by reason of said Ordinance and Franchise agreement, the beneficial use of said water pipelines and other appurtenances is vested in The Wichita Water Company, a private corporation organized for profit, and is used by said company in the production of private gain or profit under said existing franchise.

That although the legal title of said property is vested in the city of Wichita, Kansas, under the constitution and laws of the state of Kansas, and of the United States, the said property has been and now is subject to taxation, and is not exempt therefrom.

That the failure to tax said property in the past, and at this time, has been in violation of Section 1, Article XI of the constitution of the state of Kansas, which requires a uniform and equal rate of taxation, and in violation of the 14th Amendment of the constitution of the United States by reason of denial to these respective intervening defendants, and their respective taxpayers, of equal protection under the law.

WHEREFORE, these answering intervening defendants pray that the County Clerk of Harvey County, Kansas, and the State Commission of Revenue and Taxation of Kansas, be directed to assess said property for taxation for the current and prior years according to law.